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No. 93-230

In The

Supreme Court of the United States

October Term, 1993

TIMOTHY R. MCGOWAN,

Petitioner,

v.

MARK J. CROSS and
CROSS, CLAYTON & ASSOCIATES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

Petitioner respectfully submits this supplemental brief for the consideration of this Honorable Court.

FALSE STATEMENTS

The Respondents did not file a Brief in Opposition to the Petition for Writ of Certiorari. Rule 15.1 of the Rules of the Supreme Court states:

> [T]he brief in opposition should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the

> question of what issues would properly be before the Court if certiorari were granted . . . Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements *in the brief in opposition,* and not later.

By failing to file a brief in opposition Respondents have tacitly acknowledged the accuracy of the facts presented by the Petitioner in the petition for writ of certiorari. Given the evidence presented the Respondents truthfully have no other alternative.

The facts of concern are:

1) Respondent Cross filed an affidavit with the District Court containing false and meritless statements, and that the District Court relied on these false and meritless statements in rendering a decision from the bench.

2) Respondents denied use of the Plans prior to raising the defense of Fair Use.

3) Counsel for the Respondents in the District Court did not "present the record with accuracy and candor." *Pinkham v. Sara Lee Corp.*, 983 F.2d 833 (8th Cir. 1992). Specifically counsel for the Respondents failed to advise the court Petitioner offered to sell copies of the Plans to Respondents' principal (the Allens), and that Petitioner offered to contract to the Allens for the same work for which the Respondents copied the Plans and were paid.

Given that the foundations of the District Court's ruling are false and meritless statements by Respondent Cross and deceit by Respondents' counsel Federal Rule of

Civil Procedure 52.(a) dictate the Findings of Fact be set aside.

NEW CASE

In accordance with Rule 15.7 of the Rules of the Supreme Court, Petitioner brings to the attention of this Honorable Court the recent ruling of the United States Court of Appeals, Second Circuit, *Twin Peaks Productions, Ltd. v. Publications International, Ltd.*, 996 F.2d 1366 (9th Cir. 1993).

This recent case, unavailable to Petitioner at the time of the original petition, denies the defendant Fair Use on all four of the statutory factors. This case is singularly unnoteworthy in that it reflects a long history of case law based on the principles established by this Honorable Court, unlike the case at bar.

With respect to the fourth statutory factor, the effect of the use upon the potential market for or value of the copyrighted work the court declared:

> [I]t is a safe generalization that copyright holders, as a class, wish to continue to sell the copyrighted work and may also wish to prepare or license such derivative works as book versions or films. *Twin Peaks Productions, Ltd. v. Publications International, Ltd.*, 996 F.2d 1377 (9th Cir. 1993).

In the case at bar, the lower courts failed to consider the adverse impact for the future market for the Plans when determining "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107 (1988).

CONCLUSION

For the above stated reasons and the reasons stated in the petition for writ of certiorari, a writ of certiorari should be granted.

Respectfully submitted,

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